

JIM BAKER d/b/a/ BAKER HARVESTING,)	AGBCA No. 99-120-1
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Appellant)	
)	
Representing the Appellant:)	
)	
Jody Sheets)	
Natasha A. Elmore)	
D. Clay Holcomb)	
Hicks Thomas & Lilienstern)	
620 S. Taylor, Suite 208)	
Amarillo, Texas 79101)	
)	
Representing the Government:)	
)	
Daniel N. Hylton)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
South Building, Room 1547)	
1400 Independence Avenue, S.W.)	
Washington, D.C. 20250)	

RULING ON JURISDICTION BY THE BOARD OF CONTRACT APPEALS

June 10, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

On December 23, 1998, Jim Baker d/b/a Baker Harvesting, of Spearman, Texas, filed this matter with the Board involving the U. S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS) (Government). In its initial submission, Baker sought to recover \$969,860.32, plus interest and attorney fees, pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, and pursuant to the Contract Disputes Act (CDA), as amended, 41 U.S.C. §§ 601-613, as Baker, alternatively, asserts rights under a contract (between the Government and John Walker Trucking, Inc.) and a settlement agreement entered thereunder. Baker also seeks to recover attorney fees. Baker was a subcontractor, not the contractor in the underlying contract. The contractor has neither submitted a certified claim to the contracting officer nor submitted this matter to the Board on behalf of Baker.

As a threshold matter, the Board raised the issue of its jurisdiction over this filing, questioning the Board's authority to resolve a claim brought under the FTCA and an alleged claim brought by a subcontractor. Baker submitted a brief, the Government submitted a response, and Baker submitted a reply and an amended complaint. Baker does not pursue at this Board the tort claim under the FTCA. It seeks to recover as a subcontractor and as a party to compliance agreements it signed with the Government and the settlement agreement with the Government. Baker still seeks to recover \$969,860.32, plus interest and attorney fees.¹

Baker bears the burden of establishing jurisdiction. As a subcontractor, Baker is not a proper party to file an appeal with this Board. Further, even as a signatory to the settlement agreement in the underlying contract, Baker lacks the necessary privity of contract with the Government to file an appeal with this Board. That agreement does not entitle Baker to direct access to this Board. Finally, no valid claim (certified by the contractor) to the contracting officer exists under the CDA, such that a necessary predicate to an appeal to this Board is lacking. Despite Baker's assertions, the compliance agreements it entered into with the Government, which reflect its agreement to comply with sanitizing protocols, do not constitute contracts under the CDA. In any event, Baker has not submitted claims under the compliance agreements.

The Board dismisses the matter for lack of jurisdiction.

FINDINGS OF FACT

The underlying contract

1. With an award date of April 10, 1996, the USDA, APHIS, entered into Contract No. 54-6395-6-33 with John Walker Trucking, Inc. (Walker Trucking) (Contract at 1, 3). The contract specifies that a mandate of the Karnal Bunt Task Force is to survey, identify, contain and eradicate Karnal bunt (*Tilletia indica*)² from the continental boundaries of the United States. The contract specifies its duration as the Arizona wheat preharvest sampling season of 1996. (Contract at 5 (¶ C.1), 6 (¶ C.5).)

2. The contract requires Walker Trucking to provide sufficient combines and support equipment to sample fields for Karnal bunt (Contract at 6 (¶ C.7)). Further:

¹ The request for attorney fees is readily disposed of as prematurely submitted; Baker is not a prevailing party now or at the time it filed its complaint or amended complaint. Rule 35.

² "Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum X Secale cereale*). Upon detection of Karnal bunt in Arizona, the imposition of Federal quarantine and emergency actions was a necessary, short-run, measure taken to prevent the interstate spread of the disease to other wheat producing areas in the country." 62 Fed. Reg. 15,809, 15,810 (1997).

In order to prevent the spread of Karnal Bunt, the contractor will comply with sanitation guidelines currently established by the USDA Karnal Bunt Task Force.

Combines and contaminated support equipment must be sanitized with an approved treatment to the satisfaction of the USDA, APHIS.

Sanitizing must occur at the beginning of the contract, between all samples, blocks and/or fields, and at the end of the contract.

(Contract at 7-8 (¶ C.12).)

3. Baker was a subcontractor to Walker Trucking under the contract (Amended Complaint at 2 (¶ 2)). Baker maintains that it sanitized its equipment in accordance with compliance agreements and sanitizing protocols applicable thereunder (Amended Complaint at 2-3 (¶ 5); (Findings of Fact (FF) 16-17)).

4. Baker asserts that during the course of the performance, the Government altered the sanitizing protocols for equipment by increasing the strength of the bleach solution. It contends that its compliance with the modified protocols caused unanticipated damage to its combines and its business. (Amended Complaint at 2-3 (¶ 5), 5-7 (¶¶ 12-16).)

The settlement agreement

5. APHIS and Walker Trucking (as the prime contractor) and Baker Harvesting (as a subcontractor) (as well as another company, as a subcontractor), entered in a settlement agreement. By its terms, the agreement “is being entered into in order to resolve on the following terms, without any admission of liability by either party, any and all claims relating to or arising under the Contract, subject to any exceptions described herein.” APHIS agrees to pay Walker Trucking a sum of money, including for Baker \$212,133, as it pertains to damages suffered by four specific combines under the contract. (Complaint, Exhibit 7, Settlement Agreement at 1, 2-3 (¶ 2).)

6. The agreement dictates that in consideration for the payment, APHIS and Walker Trucking release each other from any claim arising under the contract, except as otherwise provided in the agreement (Complaint, Exhibit 7, Settlement Agreement at 1, 3 (¶ 3)). In addition, Baker agrees not to file any other claim of any kind against APHIS in connection with activities performed under the contract; however, the agreement specifies that Baker may file a claim against APHIS or USDA for any actions not related to their performance under the contract. (Complaint, Exhibit 7, Settlement Agreement at 3 (¶ 3).)

7. The agreement also provides that Baker agrees

not to seek compensation for damage to the Combines from USDA pursuant to any regulations that USDA and APHIS may promulgate, pursuant to 7 U.S.C.

§ 150dd(b)(2), in order to pay compensation to parties affected by the USDA's Karnal bunt quarantine and emergency action. *See, e.g.*, 61 Federal Register 35102, 35106 (July 5, 1996). However, nothing in this Agreement shall prevent [Baker] from seeking compensation from USDA for any loss of business revenue that resulted from their performance under the Contract, if USDA promulgates regulations, pursuant to 7 U.S.C. § 150dd(b)(2), in order to pay compensation for the loss of business revenue to harvesters affected by the USDA's Karnal bunt quarantine and emergency action.

(Complaint, Exhibit 7, Settlement Agreement at 4 (¶ 4).)

The dispute

8. Baker asserts that it submitted a certified claim, executed on January 12, 1998, to the Secretary of Agriculture (as well as to others) seeking to recover \$969,860.32, to which it has received no response (Complaint at 4 (¶ F), Exhibit 8).

9. In its amended complaint, Baker asserts that four of its combines (not among those identified in the settlement agreement) were damaged by complying with the modified protocols; it seeks compensation of \$57,333.33 per combine (Amended Complaint at 5 (¶ 12)).

10. Baker maintains that many of its customers would not use Baker because of its involvement in the testing programs; it claims a loss of income for 1996 of at least \$303,527, which it seeks to recover (Amended Complaint at 5-6 (¶ 13)).

11. When harvesting fields, which had tested positive for Karnal bunt, Baker maintains that it had to abide by the modified protocols, which required it to spend at least \$70,000 for repairs and parts in 1996 ruined by the stronger solutions (Amended Complaint at 6 (¶ 14)).

12. Baker seeks \$17,000, which it maintains reflects the minimum damage it suffered for lease of combines to replace those damaged by complying with the modified protocols (Amended Complaint at 6 (¶ 15)).

13. Further, Baker seeks \$500,000, which it describes as the minimum loss of income attributable to Government delay in settling claims under the contract (Amended Complaint at 7 (¶ 16)).

14. In this matter, Baker seeks to recover \$969,860.32, plus interest and attorney fees (Amended Complaint at 7).

15. The record contains no indication that Walker Trucking submitted a claim (certified or not) to the contracting officer on behalf of Baker as it relates to the issues underlying this matter. Walker Trucking has not submitted or supported this appeal in any filing with this Board; that is, the record does not suggest that Walker Trucking is sponsoring this appeal on behalf of its subcontractor.

Other information

16. Baker signed compliance agreements, dated May 14, 1996, by which it agreed to abide by Karnal bunt treatment protocols regarding equipment moving inter- and intra-state. In addition to Baker, the other two signatories were APHIS and the Arizona Department of Agriculture. (Amended Complaint, Exhibit 10).

17. The regulations in effect at the time Baker entered the compliance agreements provided:

Persons who grow, handle, or move regulated articles interstate may enter into a compliance agreement if such persons review with an inspector each stipulation of the compliance agreement, have facilities and equipment to carry out disinfection procedures or application of chemical materials in accordance with Sec. 301.89-11, and meet applicable State training and certification standards under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136b). Any person who enters into a compliance agreement with APHIS must agree to comply with the provisions of this subpart and any conditions imposed under this subpart.

(7 C.F.R. § 301.89-6 (61 Fed. Reg. 13,654 (1996)) (footnote omitted).)

18. Regulations issued and amended through June 2, 1999, address relief regarding Karnal bunt (7 C.F.R. Subpart 89; 64 Fed. Reg. 29,541-50 (1999)). While the Government has recognized that harvesters, such as Baker, suffered losses related to cleaning and disinfecting combines and the restricted movement of combines (62 Fed. Reg. 15,809, 15,814 (1997)), Baker has pointed to no regulation or commentary, and the Board has found none, which permits the relief here requested by Baker. Regulations do explicitly provide for some compensation, although not of the type sought here by Baker (7 C.F.R. §§ 301.89-14 through -16). Compensation pursuant to regulation for Baker's alleged damages may remain an unresolved issue. 62 Fed. Reg. 24,745, 24,748 (1997) ("We are still considering what compensation would be appropriate for grain harvesters and are continuing to gather information to help us make that determination. If we determine to take regulatory action to compensate grain harvesters, we will publish proposed compensation regulations in a future edition of the Federal Register."); 64 Fed. Reg. 29,541, 29,544, 29,549-50 (1999) ("Three of the commenters raised the issue of compensation. . . . [C]ompensation has been, and will continue to be, addressed in separate rulemakings that focus exclusively on that issue.").

DISCUSSION

Baker bears the burden of establishing that this Board has jurisdiction over this matter. Trent-Jones, Inc., AGBCA No. 98-104-1, 99-1 BCA ¶ 30,196. Baker relies upon the CDA in its pursuit of relief.

The CDA permits a contractor, as distinguished from a subcontractor (with few exceptions), to certify claims, to submit claims to a contracting officer, and to file appeals with boards of contract

appeals. 41 U.S.C. §§ 605(a), (d), 606; United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983). The record demonstrates that Walker Trucking has taken no action pursuant to the CDA that would give the Board jurisdiction over this matter. Moreover, the settlement agreement (FF 5-7) states that Walker Trucking agrees to bring no further action under the contract against the Government involving Baker.

Baker maintains that the Government has agreed to let Baker file an appeal directly with this Board. The settlement agreement makes no reference to Baker being able to pursue a claim under the CDA. Rather, the agreement indicates that Baker will not seek compensation relating to activities performed under the contract; the sole exception is Baker's ability to seek compensation for the loss of business revenue, if the USDA promulgates regulations. (FF 6-7.) The reference to regulations belies Baker's assertion that it obtained a right of direct access under the CDA. Even if one broadly construes Baker's assertion of Board authority, the Board has found no basis in regulation to resolve the disputes here at issue (FF 18).

Baker also contends that either the settlement agreement (FF 5-7) or the compliance agreements (FF 16-17), or both, constitute contracts within the meaning of the CDA, which permit it direct access to this Board as a contractor under the CDA. The settlement agreement between APHIS and Baker does not involve a contract of procurement or disposal within the meaning of the CDA. 41 U.S.C. § 602. Similarly, the compliance agreements are not contracts of procurement within the meaning of the CDA. The regulations do not present the compliance agreements as reflecting the procurement of services. Rather, Baker, as a signatory to such an agreement agrees to abide by particular protocols, but the Government has procured no services or agreed to make any payment to Baker by signing such an agreement. Accordingly, neither the settlement agreement nor the compliance agreements provide the Board with the authority to resolve this dispute.

RULING

The Board dismisses this matter for lack of jurisdiction.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

EDWARD HOURY

Administrative Judge

ANNE W. WESTBROOK

Administrative Judge

Issued at Washington, D.C.

AGBCA No. 99-120-1

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June 10, 1999